

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Banking and Insurance Committee

BILL: SPB 7040

INTRODUCER: For consideration by the Banking and Insurance Committee

SUBJECT: Sunset Review - Board of Funeral, Cemetery, and Consumer Services

DATE: December 15, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Messer	Burgess	BI	Pre-meeting
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

In 2005, legislation was enacted that created several public records exemptions for the Board of Funeral, Cemetery, and Consumer Services (“Board”). These public records exemptions will stand repealed on October 2, 2010 unless reviewed and saved from repeal by reenactment by the Legislature. This bill reenacts public records exemptions for 1) licensees’ trade secrets, 2) information discussed during probable cause panels, and 3) investigations and inspections conducted by the board. This bill also reenacts, while clarifying, a public records exemption for information discussed in examination development meetings. Additionally, this bill creates a permanent public records exemption for photographs of dead human bodies.

This bill substantially amends s. 497.172, F.S.

II. Present Situation:

Public Records

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, provides that:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state,

¹ Section 1390, 1391 F.S. (Rev. 1892).

² Article I, s. 24 of the State Constitution.

or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,³ which pre-dates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.⁴ Section 119.07(1) (a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Unless specifically exempted, all agency records are available for public inspection. The term “public record” is broadly defined to mean:

. . . all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

³ Chapter 119, F.S.

⁴ The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.” The Florida Constitution also establishes a right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by law or the state constitution.

⁵ Section 119.011(11), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁸ Article I, s. 24(c) of the State Constitution.

⁹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Art. I, s. 24(c) of the State Constitution.

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹² If a record is simply made exempt from disclosure requirements an agency is not prohibited from disclosing the record in all circumstances.¹³

The Open Government Sunset Review Act¹⁴ provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the three statutory criteria if it:

- allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁵

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ Section 119.15, F.S.

¹⁵ Section 119.15(4)(b), F.S.

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.¹⁶ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

... notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Public Records Exemptions for the Board of Funeral, Cemetery, and Consumer Services

In 2005, legislation was enacted that created several public records exemptions for the Board of Funeral, Cemetery, and Consumer Services (“Board”) in the following circumstances: 1) when holding meetings conducted for the purpose of developing or reviewing licensure examination questions and answers, 2) when holding probable cause panel meetings, 3) when scheduling inspections and special examinations for information held by the Department of Financial Services (DFS) pursuant to a financial examination or inspection, and 4) for trade secrets of a licensee or applicant for licensure. These public records exemptions will stand repealed on October 2, 2010 unless reviewed and saved from repeal by reenactment by the Legislature.

Exemptions Relating to Licensure Examination Meetings

Section 497.172(1), F.S., creates a public records exemption for the Board’s licensure meetings. Without legislation that saves this provision from repeal, future licensure examination questions would become public record, thereby threatening the integrity of the Board’s licensure exams.

Currently, the public has no way to be assured that the exempted discussion during licensure meetings is restricted to exclusively sensitive information regarding licensure examinations. There is no requirement that a transcription of the Board’s licensure meetings is made. The First Amendment Foundation has expressed concern to Senate professional staff that such a transcription should be made and that any information pertaining to the examination may be redacted from the record prior to public disclosure.

Exemptions Relating to Probable Cause Panel Meetings

Section 497.172(2), F.S., creates a temporary exemption for information discussed and presented in the Board’s probable cause panel meetings. These records are only exempt until 10 days after a determination regarding probable cause, at which point the records are subject to public disclosure. At times, these probable cause panel meetings may require examination of photographs of deceased persons or photographs of body parts taken or obtained by the Board staff in an investigation. Such photographs are taken to document improper treatment or storage of human remains. The Board has indicated to Senate professional staff that allowing these

¹⁶ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

photographs to be obtained and circulated in the media or on the internet could be extraordinarily hurtful and traumatic to family members of the deceased. In addition, the Board has indicated to Senate professional staff that there is a segment of the population that has a prurient and unhealthy attraction to such photographs, and releasing the photographs contributes to this inappropriate interest.

Currently, the public has no way to be assured that the exempted discussion during probable cause panel meetings is restricted to exclusively sensitive information regarding the determination of probable cause. There is no requirement that a transcription of probable cause panel meetings is made. The First Amendment Foundation has expressed concern to Senate professional staff that such a transcription should be required and that any sensitive information pertaining to probable cause may be redacted from the record prior to public disclosure.

Exemptions Relating to Financial Examinations, Inspections, and Investigations

Section 497.172(3), F.S., creates a temporary exemption for objects and information held by the Board pursuant to financial examinations, inspections, and investigations of violations under ch. 497, F.S. As an entity that is responsible for regulating the funeral and burial industry, these investigations may require the Board to come into possession of photographs of deceased persons and body parts. The Board has indicated to Senate professional staff that allowing these photographs to be obtained and circulated in the media or on the internet could be extraordinarily hurtful and traumatic to family members of the deceased. In addition, the Board has indicated to Senate professional staff that there is a segment of the population that has a prurient and unhealthy attraction to such photographs, and releasing the photographs contributes to this inappropriate interest.

Exemptions Relating to Trade Secrets

Section 497.172(4), F.S., creates an exemption for trade secrets in the possession of DFS or the Board. This exemption protects the individuals and entities that are regulated by the board from having their competitively advantageous trade secrets, such as a client list, lost to their competitors through a public records request.

III. Effect of Proposed Changes:

Exemptions Relating to Licensure Examination Meetings

This bill saves from repeal the provision in s. 497.172(1), F.S., that creates a public records exemption for the Board's licensure meetings. Without legislation that saves this provision from repeal, future licensure examination questions would become public record, thereby threatening the integrity of the board's licensing exams. By allowing the current exemption to continue this bill prevents future licensees from obtaining examination questions and answers prior to taking licensure exams. Additionally, because the public has no way to be assured that the Board has restricted the conversation at the exempted meetings to sensitive information regarding licensure examinations, this bill requires that a transcription be made of these exempted meetings. In the event of a public records request, any exempted information pertaining to the examination may be redacted from the record.

Exemptions Relating to Probable Cause Panel Meetings

This bill saves from repeal and expands in part the temporary public records exemption created by s. 497.172(2), F.S. Currently, this section exempts from public record any information discussed and presented at probable cause panel meetings held by the board. This information is only exempt until 10 days after a determination regarding probable cause, at which point the records are subject to public disclosure. This bill expands the exemption in s. 497.172(2), F.S., by creating a permanent exemption for photographs of dead bodies.

Because the public has no way to be assured that the Board has restricted the conversation at the exempted probable cause panel meetings to information regarding probable cause, this bill requires that a transcription be made of these exempted meetings. In the event of a public records request, any exempted information pertaining to a determination of probable cause may be redacted from the record.

Exemptions Relating to Financial Examinations, Inspections, and Investigations

This bill saves from repeal and expands in part the temporary public records exemption created by s. 497.172(3), F.S. Currently, this section exempts from public record any objects and information held by the Board pursuant to financial examinations, inspections, and investigations of violations under ch. 497, F.S. This information is only exempt until the close of the Board's investigation, at which point the records are subject to public disclosure. This bill expands the exemption in s. 497.172(3), F.S., by creating a permanent exemption for photographs of dead bodies.

Exemptions Relating to Trade Secrets

Section 497.172(4), F.S., currently creates an exemption for trade secrets in the possession of DFS or the Board. This bill saves this exemption from repeal by reenacting the provision in s. 497.172(4), F.S. By reenacting this exemption the bill protects those individuals and entities that are regulated by the board from having trade secrets, such as client lists, lost to competitors through a public records request.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

This bill will protect family and friends from the potential heartache and trauma of having photographs of the deceased bodies of their loved ones publicized.

C. Government Sector Impact:

The sensitive information discussed at the Board's licensure meetings remains exempt from public record, however this bill requires a transcription of all exam development meetings held by the board. Any information pertaining to the examination that the Board determines to be sensitive may be redacted from the record prior to public disclosure. The process of recording, transcribing, and redacting will result in a minor fiscal impact to the Board.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.